Nos. 04-1657 and 05-200

In the Supreme Court of the United States

JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ, PETITIONER

v.

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, ET AL.

EMPIRE HEALTHCHOICE ASSURANCE, INC. DBA EMPIRE BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH E. MCVEIGH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

MARK A. ROBBINS
General Counsel
Counsel of Record

KATHIE ANN WHIPPLE
Deputy General Counsel

JAMES S. GREEN
Associate General Counsel

JILL GERSTENFIELD

SUSAN WHITMAN
Attorneys
Office of Personnel Management
Washington, D.C. 20415

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce a provision in a health benefits plan for federal employees that is part of a government contract under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations: Page

In the Supreme Court of the United States

No. 04-1657

JULIA CRUZ, AS REPRESENTATIVE
OF JOSE S. CRUZ, PETITIONER

v.

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, ET AL.

No. 05-200

EMPIRE HEALTHCHOICE ASSURANCE, INC. DBA EMPIRE
BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX
OF THE ESTATE OF JOSEPH E. MCVEIGH

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SEVENTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the orders of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

These cases each present the question whether the federal courts have federal-question jurisdiction over cases brought to enforce the terms of contracts created under the Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. 8901 *et seq*. The courts of ap-

peals reached different conclusions on the question, and the issue merits the Court's review.

1 a. Congress enacted the Federal Employees Health Benefits Act to establish a comprehensive program that would "assure maximum health benefits for employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 957, 86th Cong. 1st Sess. 4 (1959). Today, approximately eight million federal employees, retirees, and their dependents receive health insurance through plans under FEHBA, at a total cost of about $31 billion per year in premiums, $22 billion of which is paid by the federal government. *OPM Announces Smallest Average FEHB Premium Increase in Nine Years* (Sept. 15, 2005) <http://www. opm.gov/news/opm-announces-smallest-average-FEHB-premium-increase-in-nine-years, 961.aspx>.

FEHBA delegates broad authority to the Office of Personnel Management (OPM) to administer the Federal Employees Health Benefits Program, see 5 U.S.C. 8901-8913, and to promulgate regulations necessary to carry out the statute's objectives, see 5 U.S.C. 8913. In particular, the statute gives OPM authority to contract with carriers to offer health benefits plans to federal employees, annuitants, and dependents. 5 U.S.C. 8902, 8903. Such plans must meet criteria established by OPM, and each contract must contain "a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." 5 U.S.C. 8902(d). Enrollees and beneficiaries are bound by the terms of the contract. See *Christiansen* v. *National Sav. & Trust Co.*, 683 F.2d 520, 530 (D.C. Cir. 1982).

By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. 8906 (2000 & Supp. II 2002). The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs funded by general appropriations. 5 U.S.C. 8906(b)(1), (b)(2) and (f). Premiums are deposited into a special Treasury fund called the Employees Health Benefits Fund. 5 U.S.C. 8909(a).

Under the type of fee-for-service plan at issue in these cases, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. 5 U.S.C. 8909(a); 48 C.F.R. 1632.170(b). Any balance in the Fund is not the property of the carriers. Rather, the carrier's profit, if any, comes from a negotiated service charge. See *National Ass'n of Postal Supervisors* v. *United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), aff'd, 944 F.2d 859 (Fed. Cir. 1991); see also 48 C.F.R. 1615.902. Any surplus attributable to a plan may be used, at OPM's discretion, to lower future rates, reduce future government and employee contributions, increase plan benefits, or make a refund to the government and plan enrollees. 5 U.S.C. 8909(b); 5 C.F.R. 890.503(c)(2).

The government ultimately decides whether a claim for medical services should be paid under the program. 5 U.S.C. 8902(j). If a carrier denies payment of a claim, the enrollee may seek OPM review. 5 C.F.R. 890.105(a)(1). OPM's determinations regarding the claim are subject to judicial review in federal court under the Administrative Procedure Act, 5 U.S.C. 701, 706. See, *e.g.*, *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000).

FEHBA provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. 8902(m). That provision was first enacted "to establish uniformity in Federal employee health benefits and coverage." H.R. Rep. No. 282, 95th Cong., 1st Sess. 1 (1977). It was broadened in 1998 "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live" and to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than state courts." H.R. Rep. No. 374, 105th Cong. 1st Sess. 9 (1997).

b. The largest plan in the FEHBA program is the Blue Cross Blue Shield Service Benefit Plan. Pursuant to 5 U.S.C. 8902(a), OPM has entered into annual contracts with the Blue Cross Blue Shield Association, acting on behalf of the Blue Cross Blue Shield affiliates in these two cases and a number of others across the nation. The contracts include a Statement of Benefits.[1] The Statement of Benefits in turn has a reimbursement

[1] Petitioners in *Cruz* mistakenly assert (Pet. 14) that the Statement of Benefits is not a part of the contract between OPM and Blue Cross. The contract between OPM and Blue Cross provides that "[t]he Carrier shall provide the benefits as described in the Certified Brochure Text found in Appendix A," and that "[t]he Carrier's subrogation rights, procedures and policies, including recovery rights, shall be in accordance with the Certified Brochure Text." 04-1657 C.A. App. 354, 357. The Certified Brochure Text is identical, other than in formatting, to the Statement of Benefits. Indeed, it recites that it "is based on text incorporated into the contract between OPM and [Blue Cross]." 04-1657 C.A. App. 17.

provision requiring enrollees and beneficiaries who receive compensation from a third party for an injury or illness to reimburse the plan for benefits paid.[2] If an enrollee does not voluntarily reimburse the plan, the contracts require Blue Cross to make a "reasonable effort to seek recovery of amounts * * * which it is entitled to recover in cases which are brought to its attention," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage), and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage).

2. *No. 05-200.* a. Joseph E. McVeigh, an enrollee in the FEHBA plan administered by Empire Healthchoice Assurance, Inc., suffered injuries in an automobile accident in 1997 and received approximately $157,000 in FEHBA benefits until his death in 2001. In 2003, McVeigh's estate recovered $3,175,000 in settlement of its tort suit arising from the accident. When it learned of the upcoming settlement, Empire, petitioner in No.

---

[2] The provision in No. 05-200 states in relevant part:

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.

05-200 Pet. App. 4a. The provision in No. 04-1657 dates from an earlier version of the contract between OPM and the national Blue Cross Blue Shield Association and is worded differently. It has, however, the same import. See 04-1657 Resp. Br. 3 (petition stage).

05-200, sought reimbursement for the benefits it had provided to McVeigh, and McVeigh's estate agreed to place $100,000 in escrow pending litigation. On April 18, 2003, Empire commenced this action against McVeigh's estate in the United States District Court for the Southern District of New York, seeking a declaration that it is entitled to approximately $157,000 from McVeigh's recovery as reimbursement. 05-200 Pet. App. 3a.

b. The district court granted McVeigh's motion to dismiss for lack of subject-matter jurisdiction. 05-200 Pet. App. 54a-62a. The court ruled that "Empire's claims * * * require determinations regarding the respective rights and obligations of two private parties to the health insurance contract at issue." *Id.* at 59a. The court rejected Empire's claim that federal common law governs the FEHBA contract, holding that "the only federal interest Empire identifies is the potential recovery by the United States Treasury of any reimbursement paid by the McVeigh estate to Empire," and that the only "significant conflict" between state law and a federal interest identified by Empire is "that the mere act of applying state law will * * * undermine the federal interest in uniformity." *Id.* at 59a-60a. The court rejected Empire's arguments that the Statement of Benefits itself created "federal law," *id.* at 60a, and that FEHBA's preemption provision preempted any state law that would otherwise be applicable, *id.* at 61a-62a.

c. The court of appeals affirmed. 05-200 Pet. App. 1a-45a. Noting that "FEHBA does not provide a federal statutory cause of action" applicable to this case, the court stated that "federal jurisdiction exists over this dispute only if federal common law governs Empire's claims." *Id.* at 5a. Adopting the test from *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988), the

court stated that federal common law would be applicable only if "the operation of state law would (1) significantly conflict with (2) uniquely federal interests." 05-200 Pet. App. 6a (internal quotation marks and brackets omitted). The court decided that it "need not address" whether there are "uniquely federal interests" at stake in this case because "Empire has failed to demonstrate that the operation of New York state law creates 'an actual, significant conflict' with those interests." *Id.* at 6a-7a. Although the court noted "the possibility that at a later stage in the proceedings a significant conflict might arise between New York state law and the federal interests underlying FEHBA," the court found that possibility—and the consequent need to create federal common law to fill the gap —"insufficient to confer federal jurisdiction." *Id.* at 8a.

The court also rejected the contention that federal jurisdiction "exists pursuant to FEHBA's preemption provision." 05-200 Pet. App. 10a. The court held that, under FEHBA's preemption provision, "[t]he federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law—not [FEHBA] contract terms." *Id.* at 14a.[3] The court concluded that no preemption occurs here, because FEHBA preempts only state laws that "relate[] to health insurance or plans," 5 U.S.C. 8902(m)(1), and there was no showing that the dispute in this case "im-

[3] The court originally adopted that view driven by what it perceived to be "serious constitutional problems" that would be raised if FEHBA contract provisions could preempt state law. 05-200 Pet. App. 13a; see *id.* at 26a (Sack, J., concurring); *id.* at 35a-36a (Raggi, J., dissenting). On petition for rehearing, the court tempered that rationale, noting that its "discussion of the constitutional difficulties inherent in a literal reading of § 8902(m)(1) was not an essential component" of its ultimate conclusion. *Id.* at 49a.

plicates a specific state law or state common-law principle" that so relates. 05-200 Pet. App. 15a.

d. Judge Sack filed a concurring opinion identifying "several issues" discussed by the court "that I think we do not decide." 05-200 Pet. App. 25a. Judge Raggi dissented. *Id.* at 27a-45a. In her view, Section 8902(m)(1) "requires courts to construe or enforce any term in a FEHBA plan that relates to health insurance coverage or benefits by reference to uniform federal common law, not state law." *Id.* at 28a.[4]

3. *No. 04-1657.* a. Jose S. Cruz, an enrollee in the FEHBA plan administered by Blue Cross and Blue Shield of Illinois, was injured in a car accident in 1998. 04-1657 Pet. App. 1a-2a, 3a. Blue Cross paid approximately $4600 in benefits to Cruz as a result of his injuries. Cruz ultimately recovered $30,000 in settlement of a lawsuit against the tortfeasor, of which he paid $10,000 in attorney's fees. Blue Cross sought to collect the $4600 from Cruz, but Cruz contended that Blue Cross was entitled to less than $3121 under the state "common fund" doctrine, which Cruz asserted would have required Blue Cross to shoulder some of the attorney's fees. *Id.* at 3a.

In October 2000, Cruz brought an individual and class-action suit in state court against Blue Cross, asserting various claims under the state "common fund" doctrine. 04-1657 Pet. App. 19a-20a. Blue Cross removed the action to federal court, but the district court ordered it remanded for lack of subject matter jurisdic-

[4] The government filed an amicus brief in support of the petition for rehearing and rehearing en banc in *McVeigh*. 05-200 Pet. App. 65a-79a. The panel issued an opinion denying rehearing, *id.* at 46a-51a, and denied rehearing en banc without opinion, *id.* at 52a-53a.

tion.[5] Blue Cross then filed its own action against Cruz in the United States District Court for the Northern District of Illinois, seeking reimbursement of the $4600 it had paid in benefits to Cruz. *Id.* at 4a.

b. The district court dismissed the case for lack of subject matter jurisdiction. 04-1657 Pet. App. 16a-31a. The court rejected Cruz's contention that the case "amounts to an 'improper review'" of the order remanding Cruz's previous case to state court. *Id.* at 22a. The court explained that, while the remanded case raised a claim under the Illinois common fund doctrine, the instant case is an effort to "seek[] liability against Cruz under federal common law for failure to reimburse [Blue Cross]." *Id.* at 23a. The court concluded, however, that federal common law does not govern Blue Cross's claim and that the case therefore presents no federal question. *Id.* at 26a-29a.

c. The court of appeals reversed. 04-1657 Pet. App. 1a-15a. Initially, the court agreed with the district court that this case is not an improper attempt to appeal the remand order in Cruz's earlier lawsuit. *Id.* at 5a. Moreover, the court rejected Cruz's argument that, because FEHBA expressly confers jurisdiction on federal district courts for actions against the United States under the Act, 5 U.S.C. 8912, it must be read to foreclose actions by FEHBA carriers against enrollees or beneficiaries. *Id.* at 6a. It rejected as well Cruz's argument that this would be a proper case for abstention under *Colorado River Water Conservation District* v. *United*

[5] The government has filed a Statement of Interest in the state-court litigation, arguing, *inter alia*, that Cruz's state-law claims are preempted under 5 U.S.C. 8902(m), and that federal law governs construction of a FEHBA contract.

States, 424 U.S. 800, 818 (1976). 04-1657 Pet. App. 12a-14a.

The court held that there is federal-question jurisdiction in this case because "the FEHBA-created contract provision in the Statement of Benefits preempts state law with respect to reimbursement for benefits paid to Cruz," 04-1657 Pet. App. 15a, and, "with state law preempted," the court was required "to fill in [FEHBA's] interstices with federal common law," *id.* at 12a. The court noted that FEHBA's preemption provision "dictates that the contract terms trump state law when they relate to the nature, provision, or extent of coverage or benefits including payments with respect to benefits." *Id.* at 8a-9a. The court concluded that state laws governing reimbursement do so relate. Applying such laws, the court reasoned, would undermine the statutory goal of uniformity, because "[f]ederal employees in different states would have different reimbursement obligations and hence different net benefits." *Id.* at 10a. Moreover, "[t]he cost-savings goal of Congress would also be thwarted, because reimbursements from enrollees end up in the federal fund used to pay FEHBA plan premiums." *Ibid.*

DISCUSSION

In these two cases, the Second and Seventh Circuits reached diametrically opposed conclusions on whether the federal courts have jurisdiction over a suit by a FEHBA insurance carrier to obtain reimbursement from a FEHBA participant. The conflict in the circuits is also reflected in a decision of the Eighth Circuit, which has agreed with the Seventh Circuit's conclusion, and the question can be expected to arise in the future in those and other circuits. An important premise of the

FEHBA program is that the benefits and terms of FEHBA health plans for federal employees should be nationally uniform. The circuit conflict not only threatens the achievement of that goal, but also calls into question the ability of the federal courts to exercise jurisdiction over cases involving the interpretation of government contracts involving federal employees—a matter of considerable importance more generally. Accordingly, further review is warranted. Although the Court could grant review in both cases and consolidate them, the *McVeigh* case appears to provide a more suitable vehicle for review.

A. The Availability Of A Federal Forum For FEHBA-Related Reimbursement Actions Is A Question That Merits Review

1. These two cases arise from remarkably similar facts. Both cases involve enrollees in the Service Benefit Plan, a FEHBA plan, who were involved in accidents and received medical benefits from their plans on account of their injuries. In both cases, the enrollees advanced tort claims against the parties who caused the accidents and ultimately received funds in settlement of their claims. The plan's right to reimbursement in both cases was governed by a Statement of Benefits that provided for reimbursement "in full for benefits [the plan] paid" in the event of a recovery by the enrollee against a third party. See 05-200 Pet. App. 4a n.2; see also 04-1657 Pet. App. 3a ("Plan has the right to recover payments the Plan has made."). The Statement of Benefits is incorporated into and made a part of the contract between OPM and Blue Cross. See note 1, *supra*. Other provisions in the contract provide that Blue Cross must make a "reasonable effort to seek recovery of amounts

* * * it is entitled to recover in cases which are brought to its attention," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage), and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract." 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage). In both cases, the enrollees did not reimburse the Service Benefit Plan for any of the medical benefits they had received. In both cases, the Plan brought suit to recover the funds due.

Faced with those virtually identical cases, the Seventh Circuit held that "[t]he district court has federal question subject matter jurisdiction over this case under 28 U.S.C. § 1331," 04-1657 Pet. App. 15a, while the Second Circuit "affirm[ed] the district court's dismissal of the action for lack of subject matter jurisdiction" under Section 1331. 05-200 Pet. App. 2a. Indeed, the Second Circuit was informed of the Seventh Circuit's decision in *Cruz* in a petition for rehearing and issued a supplementary opinion in which it expressly "note[d] [its] disagreement with the conclusions reached in * * * *Cruz*." *Id.* at 50a. The Seventh Circuit was informed of the Second Circuit's decision in *McVeigh* in a petition for rehearing en banc, but the court, after calling for a response, denied the petition.

Nor is the circuit conflict confined to the Second and Seventh Circuits. *MedCenters Health Care* v. *Ochs*, 26 F.3d 865, 867 (8th Cir. 1994), involved a fact-pattern virtually identical to the facts of these cases, in which an enrollee suffered injuries, received FEHBA benefits as a result of those injuries, obtained a recovery from a third party, and declined to reimburse the FEHBA plan. The plan brought an action in federal court to obtain reimbursement. Faced with a challenge to the district

court's exercise of jurisdiction, the court of appeals reached the same result as did the Seventh Circuit in *Cruz*, concluding that "the District Court properly exercised its authority to decide this case." *Ibid.*

2. Petitioner in *Cruz* asserts (Pet. 11) that *Botsford* v. *Blue Cross & Blue Shield of Montana*, 314 F.3d 390 (9th Cir. 2002), amended on reh'g, 319 F.3d 1078 (9th Cir. 2003), *Goepel* v. *National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995), and *Howard* v. *Group Hospital Service*, 739 F.2d 1508 (10th Cir. 1984), are also implicated in the conflict in the circuits. Although the analysis in those cases touches on some of the legal issues presented here, each of the cited cases, as well as *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993), arose from suits for benefits under a FEHBA plan by an enrollee or beneficiary against a FEHBA carrier, rather than, as here, suits for reimbursement by a FEHBA carrier under the contract against the enrollee. In *Botsford* and *Caudill*, the court held that federal-question jurisdiction was present, while in *Goepel* and *Howard*, the court held that it was not.[6]

Although the law was unsettled at the time most of those FEHBA benefits cases arose, it is now clear that

[6] The jurisdictional analysis in the cited cases may have been affected by the fact that the plaintiffs in those cases generally were attempting to plead state-law, not federal, claims. Under the well-pleaded complaint rule, it is possible that a particular claim may be outside federal jurisdiction (if pleaded by a party such as the enrollees or beneficiaries in those cases seeking only to invoke state law), while a closely related claim may be within federal jurisdiction (if pleaded by a party such as the FEHBA carriers in these cases seeking to invoke federal law). See *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987). Accordingly, the conflict among those cases does not necessarily implicate the conflict between *Cruz*, *McVeigh*, and *Ochs*.

FEHBA enrollees or beneficiaries who challenge a denial of benefits under a FEHBA plan must sue OPM itself—not the carrier—in a suit under the Administrative Procedure Act.[7] There is undoubtedly federal-question jurisdiction over such a suit. See *Botsford*, 314 F.3d at 398 ("FEHBA allows beneficiaries to sue the only employer and plan administrator involved in FEHBA: the United States.").[8] Accordingly, the question that arose in cases such as *Botsford*, *Caudill*, *Goepel*, and *Howard*, concerning whether there is federal jurisdiction over a claim by an enrollee or beneficiary for benefits under a FEHBA plan is unlikely to arise in future cases.

There has been no change in the law, however, that would affect federal jurisdiction in FEHBA reimbursement cases, such as the instant cases and *Ochs*. Cases such as these can be expected to arise with considerable frequency in the future. It is not uncommon for FEHBA participants, as for others who have access to a third-

[7] OPM amended the regulations to provide for suit against OPM, rather than against the insurance carrier, in 1995. See 60 Fed. Reg. 16,039 (1995) (amending 5 C.F.R. 890.107 to clarify that suit must be brought against OPM); see also *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000); *Bryan* v. *OPM*, 165 F.3d 1315 (10th Cir. 1999); *Burgin* v. *OPM*, 120 F.3d 494 (4th Cir. 1997).

[8] Petitioner in *Cruz* mistakenly contends (Pet. 11) that *Botsford* "squarely conflicts" with the Seventh Circuit's decision in *Cruz*. *Botsford* held that the construction of a FEHBA contract is necessarily governed by federal law. See 314 F.3d at 395 ("[A]pplication of state laws in cases involving denials of or disputes over benefits would undermine congressional intent.") *Botsford* therefore agreed with the Fourth Circuit's decision in *Caudill*, and the holdings in both cases are generally consistent with the Seventh Circuit's holding in *Cruz*. *Goepel* and *Howard* found no federal jurisdiction in a similar context, and the holdings in those cases are therefore generally consistent with the Second Circuit's decision in *McVeigh*.

party source of payment for medical expenses, to obtain payments for medical expenses caused by accident-related injuries and then recover from a tortfeasor for those same injuries. Cf., *e.g.*, *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005) (Medicaid); *Sereboff* v. *Mid Atlantic Med. Servs.*, cert. granted, No. 05-260 (Nov. 28, 2005) (ERISA plan). Three circuits—two of them very recently—have taken a position on the ability of a FEHBA carrier to enforce its reimbursement provision in those circumstances in federal court, and the question can be expected to continue to arise in the future. The conflict in the circuits creates a disuniformity in an area in which Congress intended a uniform nationwide scheme. Accordingly, further review is warranted.

B. The Seventh Circuit Correctly Concluded That A Federal Forum Is Available

The Seventh Circuit in *Cruz* correctly concluded that there is federal-question jurisdiction over a suit by a FEHBA carrier for reimbursement of benefit payments, and the Second Circuit in *McVeigh* accordingly erred. Federal jurisdiction rests on two bases.

1. First, federal jurisdiction is present because a suit to enforce a FEHBA contract necessarily sets forth a federal claim. This Court held in *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15, 22 (1982), that because the federal statute at issue there contemplated collective-bargaining agreements between unions and local transit authorities that received federal grants, "it is reasonable to conclude that Congress expected * * * the collective bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach." *Id.* at 20-21. Similarly here, because FEHBA contemplates contracts between OPM and insurance

carriers that are also binding on enrollees and beneficiaries, it is reasonable to conclude that Congress expected the contracts to be enforceable by suit upon a breach. The only remaining question is whether such contract actions set forth federal, rather than state, claims. See *id.* 21. Here, the pervasively federal character of the relationship established by federal statute makes clear that federal, rather than state, law governs.

The Court explained in *Jackson Transit* that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and * * * private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." 457 U.S. at 22 (citing, *inter alia*, *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *Norfolk & Western R.R.* v. *Nemitz*, 404 U.S. 37 (1971); *American Surety Co.* v. *Schulz*, 237 U.S. 159 (1915)). Such suits set forth federal claims if Congress intended the contracts to be "creations of federal law" and "that the rights and duties contained in those contracts be federal in nature." 457 U.S. at 23.[9]

A FEHBA contract is undoubtedly a "creation[] of federal law." See 5 U.S.C. 8902(a). The FEHBA carriers in these cases are suing to enforce provisions of FEHBA contracts, to which the government is a party and in which the government has a substantial financial interest. Cf. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."). The suits were undertaken pursuant to

[9] As the Court explained in *Jackson Transit*, the question in this context is not whether Congress conferred an implied private right of action, "but whether Congress intended such contract actions to set forth federal, rather than state, claims." 457 U.S. at 21.

the carriers' express contractual obligation to the government to enforce those specific provisions. Moreover, nationwide uniformity is a core purpose of the federal program. In these circumstances, it is clear that Congress intended that the "rights and duties contained in those [FEHBA] contracts be federal in nature." *Jackson Transit*, 457 U.S. at 23.

That conclusion is confirmed by FEHBA's preemption provision, which provides that "[t]he terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law * * * which relates to health insurance or plans." 5 U.S.C. 8902(m)(1). Terms in FEHBA contracts that provide for reimbursement "relate to the nature, provision, or extent of * * * benefits (including payments with respect to benefits)," because they provide that the enrollee must return payments for benefits to the carrier under certain circumstances. Moreover, state laws that would govern the reimbursement available to a FEHBA carrier "relate[] to health insurance or plans." Because state law on such subjects therefore is preempted, it follows that these subjects must be governed by *federal* law, including FEHBA, the contracts with carriers that in turn bind enrollees and beneficiaries, and federal common law where necesary to fill in interstices. The suits contemplated by Congress to enforce a contract between OPM and a carrier therefore necessarily arise under federal law for purposes of the district courts' jurisdiction under 28 U.S.C. 1331.

In *Jackson Transit* itself, the Court concluded that the relevant contract was not governed by federal law, but the opposite is true here. The Court in *Jackson*

Transit observed that, although the contract in that case between the local transit agency and its employees' union was mandated by federal law, the "statutory language provide[d] no definitive answer" to the question whether Congress intended that the rights and duties under that contract be controlled by federal law. 457 U.S. at 24. Reviewing the legislative history, however, the Court found a "consistent theme" that "Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Ibid.* Accordingly, the Court held that a suit to enforce the contract did not present a federal question. In this case, by contrast, the federal government is a party to the contract, the federal interest and involvement in the contract are far stronger than in *Jackson Transit*, and there is nothing in the FEHBA statute or legislative history cutting the other way. To the contrary, FEHBA's preemption provision makes clear that Congress intended federal law to govern, and the legislative history shows that one of the purposes of the broadening of that provision in 1998 was to reinforce the basis for having disputes resolved in federal court. See p. 4, *supra.* Under the *Jackson Transit* analysis, therefore, there is federal-question jurisdiction over these cases.

2. Second, jurisdiction under 28 U.S.C. 1331 would lie even over a state-law contract action seeking reimbursement here, because a federal question would be a necessary and disputed ingredient. This Court explained in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2368 (2005), that federal-question jurisdiction will lie over a state-law cause of action if the "state-law claim necessarily raise[s] a stated federal issue, actually disputed

and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." See *Chicago* v. *International College of Surgeons*, 522 U.S. 156 (1997); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Thus, even if the carrier's suits in *Cruz* and *McVeigh* rested only upon state-law causes of action, it would nonetheless remain true that the construction and application of the FEHBA contract itself and its reimbursement provisions—essential ingredients in any such state-law cause of action—are matters of federal law; that those matters are "actually disputed" (because the enrollee presumably does not concede his liability for reimbursement in the amount sought); and that recognizing the federal nature of the claim would not alter any congressionally approved balance between federal and state courts (because there is no basis for believing that Congress intended that state courts alone would adjudicate disputes arising under FEHBA contracts). Accordingly, under *Grable*, federal jurisdiction would lie in these cases, even if the FEHBA carriers' claims necessarily rested on state-law causes of action.

C. The Second Circuit's *McVeigh* Case Provides The Better Vehicle For Review Of This Question

Because both *Cruz* and *McVeigh* present the question whether there is federal jurisdiction in very similar factual settings, the Court could grant review in either case. The Court could also grant review in both cases, although the similarity between them suggests that doing so would be unnecessary. The best course would appear to be to grant the petition in *McVeigh*, which appears to be the better vehicle, and hold *Cruz* for disposition in light of the decision in *McVeigh*. The *Cruz* case involves an unusual situation involving parallel

state litigation, which could be argued to raise additional issues that are not independently worthy of plenary review. See 04-1657 Pet. i (question presented includes reference to "where a state court action was already proceeding on the issue").[10] *McVeigh* does not involve that additional complication, and it would therefore appear to be the better vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari in No. 05-200 should be granted. The petition in No. 04-1657 should be held and then disposed of as appropriate in light of this Court's decision in No. 05-200.

Respectfully submitted.

MARK A. ROBBINS
General Counsel
Counsel of Record

KATHIE ANN WHIPPLE
Deputy General Counsel

JAMES S. GREEN
Associate General Counsel

JILL GERSTENFIELD

SUSAN WHITMAN
Attorneys
Office of Personnel Management

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

DECEMBER 2005

[10] In addition, the petitioner in *Cruz* argued to the court of appeals that the case was an improper attempt to appeal the earlier order rejecting the removal of petitioner's case from state court and remanding it back to that court. 04-1657 Pet. App. 5a; see 28 U.S.C. 1447(d). The court of appeals correctly rejected that argument, and petitioner has not renewed it in this Court. 04-1657 Pet. App. 5a.